No. 77-900

In the Supreme Court of the United States

OCTOBER TERM, 1977

VELSICOL CHEMICAL CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 3a-13a) is reported at 561 F. 2d 671.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on July 29, 1977, and a petition for rehearing was denied on September 26, 1977 (Pet. App. 14a-16a). The petition for a writ of certiorari was filed on December 23, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the judgment of the court of appeals should be vacated as moot.

2. Whether documents subpoenaed by the grand jury were protected from disclosure by the work-product privilege.

3. Whether petitioner waived any attorney-client privilege it had with respect to documents and testimony sought by the grand jury.

STATEMENT

This case arises from a grand jury investigation in the United States District Court for the Northern District of Illinois to determine whether petitioner, Velsicol Chemical Corporation, or any of its officers or employees committed criminal violations by withholding information from the Environmental Protection Agency (E.P.A.) that would tend to show that pesticides manufactured by petitioner were carcinogenic. On February 9, 1977, the grand jury issued a subpoena directing three attorneys of the law firm of Sellers, Connor and Cuneo, petitioner's counsel in the proceedings before the E.P.A., to testify and produce documents concerning whether all information petitioner possessed regarding the carcinogenicity of the pesticides had been transmitted to the E.P.A.[1]

One of petitioner's attorneys, Robert Ackerly, appeared before the grand jury but refused to answer questions on the ground that the subject of the inquiries was protected by the attorney-client privilege. He also refused to produce some of the subpoenaed documents, claiming

[1]The subpoena duces tecum called for three limited categories of documents of the Sellers firm: (1) an allegedly false legal memorandum and affidavit, and carcinogenicity studies commissioned by petitioner and conducted by an outside laboratory, (2) the final reports of those studies, and (3) reports relating to those studies authorized by independent pathologists or toxicologists commissioned by petitioner.

they were protected by the work-product privilege. The government then moved to compel Ackerly to testify and to produce the documents, and petitioner moved to intervene and to quash the subpoena. The district court granted petitioner's motion to intervene but denied its motion to quash. The court ruled that any attorney-client privilege that may have attached to the documents and testimony had been waived by Neil Mitchell, petitioner's "Vice-President-Legal," or house counsel, and Bernard Lorant, an attorney who had represented petitioner before the E.P.A., when they testified before the grand jury about the allegedly false memorandum and affidavit filed with the E.P.A. and about matters relating to petitioner's failure to submit the carcinogenicity data to the E.P.A. The court also held that the work-product privilege was unavailable as a basis for resisting production of the documents for the grand jury, since they had not been prepared by counsel representing petitioner before the grand jury or in anticipation of the grand jury proceeding.

Petitioner took an interlocutory appeal under *Perlman* v. *United States*, 247 U.S. 7, and the court of appeals affirmed (Pet. App. 1a-13a). On September 29, 1977, three days after denying a petition for rehearing, the court of appeals refused to grant petitioner's motion to stay its mandate pending the filing of a petition for a writ of certiorari.[2] At the same time, the district court ordered Ackerly to testify and produce the subpoenaed documents for the grand jury on October 5, 1977. Ackerly then complied with the court's order. On December 12, 1977, the grand jury indicted petitioner and six of its former

[2]Mr. Justice Stevens, acting as Circuit Justice, also denied petitioner's application to stay the court of appeals' mandate on October 3, 1977 (No. A-307).

and present employees for conspiracy to conceal material facts and make false statements to the E.P.A., in violation of 18 U.S.C. 371, 1001, and 1341.

ARGUMENT

1. Although petitioner has not raised the issue of mootness in its "Questions Presented" (Pet. 2), it nevertheless contends that the judgment of the court of appeals must be vacated as moot because of Ackerly's "disclosure [before the grand jury] and the subsequent events," which show that "there is no longer a case or controversy for this Court to adjudicate" (Pet. 5). Granting *arguendo* petitioner's premise that the controversy regarding Ackerly's testimony and the production of documents to the grand jury has become moot, petitioner is not thereby entitled to vacation of the court of appeals' judgment under the circumstances of this case.

Petitioner was afforded a full opportunity to litigate its legal claims in the district court and in the court of appeals. Both courts concluded without dissent that neither the attorney-client privilege nor the work-product privilege was available to Ackerly to justify his refusal to divulge the testimony and documents sought by the grand jury in connection with its criminal investigation. These determinations are essentially fact-bound—depending, for example, on an assessment of Mitchell's status before the grand jury and the grand jury's need for the subpoenaed information claimed to be clothed with a qualified privilege—and, as we show at pp. 8-10, *infra*, plainly would not warrant the exercise of this Court's power of discretionary review in the absence of a suggestion of mootness.[3] If this Court would not grant review in this

[3]The denial of a stay by the court of appeals and the Circuit Justice also suggests that the issues raised by petitioner are not worthy of review by this Court.

case otherwise, it is neither necessary nor appropriate for the Court to disturb the judgment of the court of appeals merely because petitioner asserts that the controversy has subsequently become moot. See *Dove* v. *United States*, 423 U.S. 325.

The cases relied on by petitioner are not to the contrary. In *Weinstein* v. *Bradford*, 423 U.S. 147, *Preiser* v. *Newkirk*, 422 U.S. 395, and *Board of School Commissioners of the City of Indianapolis* v. *Jacobs*, 420 U.S. 128, it was only *after* the Court had granted certiorari to review the substantive legal question presented that it was determined that the controversy had become moot. Hence, because the Court had been deprived of jurisdiction to decide a legal issue thought worthy of review, the appropriate disposition was to vacate the judgment of the court of appeals and to remand with directions to dismiss the complaint. Nothing in those decisions suggests that the Court must automatically grant certiorari and vacate the court of appeals' judgment in cases not posing issues of sufficient importance to warrant review, solely because a party asserts that the case may have been mooted while its petition was pending or, as here, months before the petition was filed.[4]

Petitioner asserts, however, that the course it urges "must be followed in order to avoid any possible collateral estoppel effects that might otherwise unfairly ensue from the judgment below" (Pet. 6). But such unfairness is possible only in a case in which this Court would have granted review but was foreclosed from doing

[4]A different rule should apply where a case has become moot while on appeal, since in such instances the appellant has been deprived of his right to an appellate resolution of the controversy. See *United States* v. *Munsingwear, Inc.*, 340 U.S. 36. By contrast, "[a] review on writ of certiorari is not a matter of right * * *." Supreme Court Rule 19(1).

so by mootness intervening between the judgment of the court of appeals and this Court's consideration of the certiorari petition. Where, on the other hand, the issues presented do not independently warrant review, the action of this Court in denying certiorari itself stands as proof that there has been no unfairness to the petitioner. Indeed, action by this Court vacating a judgment of the court of appeals on account of subsequent mootness, although that judgment would not otherwise have been reviewed, is unfair to the party that prevailed in the court of appeals. Such a result needlessly deprives the respondent of any collateral benefits that might inure to it from the judgment, while at the same time conferring upon the petitioner an undeserved windfall that it could not have secured if the controversy had remained alive until such time as this Court passed upon the certiorari petition.

In sum, we submit that cases in which there is a suggestion of mootness arising subsequent to the judgment of the court of appeals should be disposed of in the following manner. If the Court would have denied the petition had there continued to be a live controversy, it should deny it even though there has been a suggestion of mootness. If, on the other hand, the Court might have granted the petition but for the problem of mootness, it should vacate the judgment of the court of appeals where the mootness is clear and undisputed; where the mootness is uncertain or disputed, the Court should remand the case to the lower court in order for that court to resolve the jurisdictional question. Such an approach, in addition to eliminating the possibility that either party will suffer unfairness on account of post-judgment events, would have the benefit of avoiding the need, in cases where the question of mootness is debatable, for this Court or the lower courts to wrestle with mootness problems relating

to decisions that would otherwise have become final. Consideration of disputed questions of mootness, which often present difficult legal and factual determinations, would be limited to that relatively small percentage of cases raising issues worthy of this Court's review.[5]

It might appear at first blush that the approach we suggest, because it requires the Court to consider the "merits" of what may be a moot case, conflicts with the principle that the federal courts are empowered to decide only real controversies. But this objection is incorrect. While this Court may now lack jurisdiction to decide the validity of the claims of privilege advanced by petitioner in its attempt to defeat the subpoena, the Court unquestionably has jurisdiction to rule on the certiorari petition. And while there may no longer be a live

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[5]We recognize that the authorities cited by petitioner (Pet. 6 n. 2) suggest that this Court will consider and dispose of any case on grounds of mootness without regard to the importance of the underlying questions presented for discretionary review. We do not agree, for the reasons indicated above, that this is either a just or a practical course of action in the overwhelming majority of cases. Here, for example, petitioner undoubtedly desires to secure vacation of the judgment of the court of appeals so that it may be free, should the issue arise in the criminal prosecution, to relitigate the questions of evidentiary privilege decided adversely to it after one full and fair litigation. The policies underlying the doctrine of collateral estoppel suggest that such burdensome relitigation should not be encouraged. Moreover, given the realistic possibility that the collateral consequences of the judgment below may prove significant in subsequent litigation between the parties, the question arises whether this case should in fact be considered moot. Compare *United States* v. *Friedman*, 532 F. 2d 928, 931 (C.A. 3), with *United States* v. *Lyons*, 442 F. 2d 1144, 1145-1146 (C.A. 1). The sole virtue of the practice urged by petitioner is administrative convenience. However, it would be equally administratively convenient, and would cause unfair results in a far smaller proportion of cases, to deny or dismiss the certiorari petition whenever a case has become moot pending review in this Court.

controversy between the parties as to whether Ackerly must testify and produce documents before the grand jury, there is a real and substantial controversy regarding the proper disposition of the instant petition; the resolution of which may determine petitioner's right to litigate the privilege issues a second time.

The problem thus presented for this Court's decision is whether petitioner should be relieved of the effects of a judgment it can no longer have overturned, at the cost of depriving the respondent of a judgment in its favor. The correct resolution of this dilemma, we submit, should depend on an analysis of the relative fairness to the petitioner and the respondent from either denying certiorari or vacating the judgment of the court of appeals. That analysis, in turn, depends upon a consideration of whether the issues presented by petitioner might have merited review if the case had remained alive pending this Court's disposition of the certiorari petition. Hence, the Court's incidental consideration of the substantive claims raised in the petition is necessary to the resolution of a live, rather than a hypothetical, controversy, and is in no sense an advisory opinion.

2. Petitioner's claims, as previously noted, do not warrant review. Petitioner first contends (Pet. 6-11) that papers subpoenaed from the law firm that represented it before the E.P.A. were immune from discovery because they were protected by the work-product privilege. The court below properly rejected this contention (Pet. App. 11a-12a), since the result petitioner seeks would serve none of the purposes underlying the work-product doctrine. That doctrine is basically designed to protect the privacy of a lawyer's mental processes, to immunize his

trial strategy from discovery, and to preserve the efficacy of the adversary system by preventing counsel from depending on opposing counsel to collect the information needed to prepare his case. See *Hickman* v. *Taylor*, 329 U.S. 495, 508; *United States* v. *Nobles*, 422 U.S. 225, 236-238; *Developments in the Law— Discovery*, 74 Harv. L. Rev. 940, 1027-1029 (1961).

These interests would not be materially advanced by applying the qualified privilege to the papers subpoenaed by the grand jury in this case. Those documents were prepared in connection with separate administrative proceedings before the E.P.A., rather than for any matter before the grand jury, and were prepared by counsel other than those who represented petitioner in the grand jury inquiry. Moreover, the court of appeals observed (Pet. App. 12a) that the focus of the grand jury's inquiry was "to determine if [the papers'] preparation was attended by misconduct." As this Court remarked in *Hickman* v. *Taylor, supra*, 329 U.S. at 511:

> We do not mean to say that all written materials obtained or prepared by an adversary's counsel with an eye toward litigation are necessarily free from discovery in all cases. Where relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case, discovery may properly be had.

See also *United States* v. *Nobles, supra*, 422 U.S. at 238-239. The documents relating to petitioner's denial that it had withheld carcinogenicity data from the E.P.A. were essential to the grand jury's investigation. Thus, even assuming that a work-product privilege might attach to the papers in the context of the grand jury proceeding, that privilege was outweighed by the grand jury's urgent

need for all relevant information in the interest of public justice. See *United States* v. *McKay*, 372 F. 2d 174 (C.A. 5); *In re Grand Jury Proceedings*, 73 F.R.D. 647 (M.D. Fla.). Cf. *Branzburg* v. *Hayes*, 408 U.S. 665; *Blair* v. *United States*, 250 U.S. 273, 282.[6]

3. Finally, the court below correctly determined that petitioner, acting through Neil Mitchell, its house counsel and one of its senior officers, waived any attorney-client privilege it possessed with respect to its communications to Ackerly about the filing of the allegedly false memorandum and affidavit and the concealment of the carcinogenicity data (Pet. App. 7a-10a).[7] We rely upon the court of appeals' thorough analysis of that factual question.

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[6]*In re Terkeltoub*, 256 F. Supp. 683 (S.D. N.Y.), involved requests for disclosures constituting "the lawyer's work in investigating and preparing the defense of a criminal charge." *Id.* at 684. *In re Grand Jury Proceedings*, 473 F. 2d 840 (C.A. 8), involved corporate counsel's investigation in anticipation of the very corporate bribery inquiry that the grand jury was conducting. In *United States* v. *Mitchell*, 372 F. Supp. 1239 (S.D. N.Y.), not only did the district court not address the issue whether the work-product privilege is limited as petitioner contends, but also it appears that the attorney from whom the documents were obtained by the grand jury had represented his client before the grand jury as well as in earlier civil litigation. *Id.* at 1244. Finally, as the court below noted (Pet. App. 11a-12a), *Duplan Corp.* v. *Moulinage et Retorderie de Chavanoz*, 487 F. 2d 480, 483 (C.A. 4), involved the issue whether documents generated by patent infringement suits automatically lose their work-product immunity on termination of those proceedings and become generally available to discovery in subsequent civil litigation. Although the Fourth Circuit concluded that the documents retained their privilege, it observed that the privilege was a qualified one and could be overborne by a showing of need. *Id.* at 485. The court below correctly concluded that this case was distinguishable because it involved a subsequent grand jury criminal investigation, not a civil suit.

[7]Petitioner asserts (Pet. 11) that the court of appeals misapprehended the record when it observed (Pet. App. 9a) that Mitchell was conferring with Vincent Fuller of Williams & Connolly during the course of the grand jury testimony that was held to constitute a waiver. The record that the court of appeals cited (C.A. App. E 42) and that we are lodging with the Clerk of this Court fully supports the court of appeals' conclusion. Additionally, contrary to petitioner's present allegations (Pet. 11-12), petitioner failed to adduce any evidence below to show that Mitchell's waiver was contrary to its instructions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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